IN THE

Supreme Court of the United States

OCTOBER TERM 1979
NO. 79-728

STAR SHIPPING A/S, the Motorship STAR CLIPPER and BUCHANAN SHIPPING CO., INC.,
Petitioners,

v.

PACIFIC LUMBER & SHIPPING COMPANY, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Petitioners misspeak themselves when they state that the court of appeals entered its order "affirming the judgment of the district court". Of course, the court of appeals did no such thing, but instead dismissed the appeal as being from a non-appealable order, see Appendix A to the Petition. Respondents, however, do not dispute the jurisdiction of this Court to consider the petition.

QUESTIONS PRESENTED

The question presented by the petition should be more accurately stated as, whether the adoption of the Convention On The Recognition And Enforcement Of Foreign Arbitral Awards as part of our domestic law in 1970, justifies or requires reversal of a rule of procedure settled for over forty years by decisions of this Court and courts of appeal? Or perhaps the question should be, does this petition present any recognized ground for granting a writ of certiorari?

REASONS FOR DENYING THE PETITION

I. The Petition's Attempt To Obtain Reversal Of A Settled Rule Of Procedure Does Not Qualify For The Granting Of Certiorari

From 1935 when this Court decided Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935) to the present date, this Court and courts of appeal in an unbroken line of decisions have held that an order granting or denying a stay of an admiralty suit pending arbitration is not appealable as a matter of federal procedural law. Twenty years after its decision in Schoenamsgruber, this

Court adhered to that position in Baltimore Contractors v. Bodinger, 348 U.S. 176 at 184 (1955). In 1967 this Court denied certiorari to consider the issue of appealability of such an order in Rederi A/B Disa v. Cunnard SS Co., 389 U.S. 852 (1967).

The courts of appeal in decisions both before and after the unification of admiralty and civil rules, and the adoption by Congress in 1970 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq., have uniformly followed and applied Schoenamsgruber. In Penoro v. Rederi A/B Disa, 326 F.2d 125 (2d Cir. 1967) the Court of Appeals for the Second Circuit held that the unification of civil and admiralty rules did not affect prior decisions denying the appealability of an order in an admiralty case granting stay of an action pending arbitration pursuant to a charter agreement. And the court pithily answered petitioners' cries that such an order should be regarded as one of substance which is required to be appealable, by stating at 326 F.2d 131:

> Stays of the kind with which this case is concerned are merely calendar orders. They do no more than delay proceedings; in the great majority of cases they do not, in practical effect, determine substantial rights of the parties or cause irreparable harm. They demonstrate no crying need for an exception to the final judgment rule.

Despite Mr. Justice Black's opinion to the contrary, see 389 U.S. 852, 853 (1967) -- on which petitioners rely but with which only one other Justice of this Court agreed -- this Court denied certiorari.

Other cases from circuit courts of appeal holding that unification of admiralty and civil rules has not changed the rule denying appealability of such interlocutory orders in admiralty are O'Donnell v. Latham, 525 F.2d 650 (5th Cir. 1975), and J.M. Huber & Co. v. M/V Pym, 468 F.2d 166 (4th Cir. 1972). The latter case, like the case at bar, was an action in admiralty to recover damage to cargo wherein the defendant filed a motion to stay the proceeding pending arbitration pursuant to a charter party provision, which motion to stay was denied. The court of appeals held that the order denying the stay was not appealable,

following Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935).

If there were any doubt of the continuing vitality of the rule of non-appealability of the kind of order involved in this case, it has been laid to rest by the recent decision of the Court of Appeals for the Second Circuit in Tradax Ltd. v. M/V Holendrecht, 550 F.2d 1337 (2d Cir. 1977). That case involved an appeal from an order granting the shipowner's motion to stay a cargo damage suit pending arbitration. After exhaustively reviewing all possible legal grounds upon which an appellant might base an appeal from an order granting or denying a stay pending arbitration in an admiralty proceeding, the Second Circuit held that such orders were under no circumstances appealable. The court concluded at 550 F.2d 1341:

> We are thus required to confine appealability in maritime matters only to stays in an action at law or to final orders in independent actions.
>
> We have reviewed the situation once again to indicate that there has been no fundamental change in the past decade. We reiterate, in the hope of discouraging wasteful appeals, upon which we can impose sanctions if we think them to be filed for

purposes of delay, that orders such as this one are simply not appealable.

(Emphasis supplied.) Just last year the Court of Appeals for the Fifth Circuit, on the same grounds granted a motion to dismiss an appeal from an order denying a stay pending arbitration in a proceeding in admiralty, W.R. Grace & Co. v. Crustamar, 571 F.2d 318 (5th Cir. 1978).

We submit: The instant petition in no way qualifies for the granting of certiorari. The order of the court below was entered, not in conflict with but in conformity to, the uniform decisions of this Court and lower federal courts governing this rule of procedure for more than forty years. This Court's Rule 19 states the considerations governing review on certiorari; in no way does this case qualify.

II. The Adoption Of The Convention On The Recognition And Enforcement Of Foreign Arbitral Awards Provides No Ground For Reversing The Settled Rule Of Non-Appealability

The only possible question for consideration with respect to this petition is whether the

enactment of the Convention as domestic law, should compel the reversal of forty years of precedent holding non-appealable, orders granting or denying a stay of admiralty proceedings pending arbitration. Certainly, there is nothing in the language of either the Convention itself, (see following 9 U.S.C.A. § 201), or our statutes requiring enforcement of the Convention, 9 U.S.C. § 201-208, which in any way pertain to the issue of the appealability of such an order as was entered by the district court in the case at bar. In fact, the Convention manifests an intent that the rules of procedure of each contracting state be followed--not over-ridden. See Article III, stating, "Each Contracting State shall . . . enforce [arbitral awards] in accordance with the rules of procedure of the territory where the award is relied upon, . . ."

As previously indicated there have been a number of cases decided by the courts of appeal since the enactment by Congress of the Convention in 1970, which have reaffirmed the vitality of

Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935), with no indication that the adoption of the Convention has affected this well-settled rule of procedure that orders granting or denying a stay of an admiralty proceeding pending arbitration are not appealable. See, e.g., Tradax Ltd. v. M/V Holendrecht, 550 F.2d 1337 (2d Cir. 1977).

The principle reason why the adoption of the Convention is irrelevant to the issue of appealability of the order of the district court, is that foreign arbitration provisions in maritime contracts were specifically enforceable under the Arbitration Act of 1925, 9 U.S.C. § 1-8. Consequently the adoption by Congress of the Convention did not add new law and accordingly provides no basis for reversing the rule of procedure obtaining before the adoption of the Convention, that orders such as involved here are not appealable. This follows from this Court's decision in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). In that case this Court had granted certiorari to consider

whether an arbitration agreement in an international sales contract was specifically enforceable. The lower court had held that it was not enforceable and had granted an injunction against the seller, enjoining him from proceeding with arbitration pursuant to a provision of their sales contract requiring arbitration before the International Chamber of Commerce in Paris. This Court, reversing, held that a foreign arbitration clause in an international sales contract was specifically enforceable, but the court reached this result under the original act, the Arbitration Act of 1925, 9 U.S.C. § 1 et seq. The case arose after the adoption of the Convention in 1970, yet the court found the 1925 Act to be applicable as requiring arbitration, finding that the sales contract there involved constituted "Commerce . . . with foreign nations" pursuant to § 1 of the Federal Arbitration Act, 9 U.S.C. § 1, and hence the arbitration agreement of the sales contract was "valid, irrevocable and enforceable" under the express provisions of the original Arbitration Act, see fn. 5, 417 U.S. at 511.

Aside from their lament that orders denying a stay of admiralty proceedings pending arbitration ought to be appealable, the entire thrust of the petition is that the adoption of the Convention has somehow rendered necessary a change in the law of appealability of such orders. But is is crystal clear from Scherk, supra, that the adoption of the Convention did not change the law because foreign arbitration agreements such as those contained in the bills of lading in the instant case, were just as enforceable -- if valid and they otherwise qualified -- under our pre-existing Federal Arbitration Act of 1925 as they have been subsequent to the adoption of the Convention. It follows, then, that the Convention furnishes no ground to reverse the settled rule of procedure relating to what orders are appealable and what are not under applicable procedural rules.

III. The District Court's Order Did Not Violate But Instead Applied The Terms Of The Convention

There have, in fact, been no "subsequent developments" since the petition for certiorari

was denied by this court in 1967 in Rederi A/B Disa v. Cunnard SS Co., 389 U.S. 852, see Petition for Certiorari, P. 9, which have anything to do with the procedural issue of whether an order granting or denying a stay of an admiralty proceeding pending arbitration is appealable.

Petitioner complains that the district court's order was an exercise of parochialism, displayed an unwarranted hostility toward the enforcement of arbitration provisions as the court was obliged to do pursuant to the provisons of the Federal Arbitration Act, and that somehow unless such orders are immediately appealable there will be a frustration of requirements of Article II of the Convention if left to the hands of hundreds of federal district judges "in all their unpredictable variety", Petition P. 11. Judge Beeks in this case did not ignore but instead applied the provisions of the Convention, and found the Convention not applicable in the following two respects:

1. Article II of the Convention requires enforcement of an "agreement in writing" containing

an arbitration clause, and defining "agreement in writing" to include a contract or an arbitration agreement "signed by the parties or contained in an exchange of letters or telegrams". The necessity that there be a freely negotiated voluntary agreement for arbitration in order that such purported agreements shall be specifically enforceable, was underscored by this Court's decision in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), which enforced a foreign forum clause because it was found to be contained in a freely negotiated agreement. The Court stated at 407 U.S. 12:

> The choice of [a foreign] forum was made in arms-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

Compare that to the present case, where the record shows that as Judge Beeks found, not only was the arbitration clause of the bills of lading not "freely negotiated" between the parties, but it was not negotiated at all, since the respondent shippers did not even receive the bills of lading until after the ship had left the port of shipment!

In short, there was here no "agreement in writing" providing for arbitration which the district court was required to enforce pursuant to the mandate of the Convention.

2. Article II of the Convention further provides that the court of a contracting state shall refer the parties to arbitration "unless it finds that the said agreement is null and void, . . ." That is just what the district court did because it found the arbitration clause in this contract of common carriage to violate the provisions of the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(8) as constituting an agreement tending to lessen the liability of the carrier by making more difficult the right of American shippers of cargo to obtain satisfaction from the carrier of their claims for cargo loss and damage. Section 1303(8) of COGSA specifically provides that such agreements in a contract of carriage "shall be null and void and of no effect".

Not only does paragraph 3 of Article II of the Convention specifically provide that the court of

a contracting state should not refer the parties to arbitration if it finds that the agreement is null and void, but Article V provides that recognition and enforcement of an arbitral award may be refused if the arbitration "agreement is not valid under the law to which the parties have subjected it . . ." Thus the district court in the case at bar did not ignore but instead applied the Convention in accordance with its terms. Whether the district court was right or wrong in finding the arbitration agreement null and void is a matter that can be tested on appeal when a final order is entered in this case which is appealable in accordance with the well-settled rules of appellate procedure. It is clear, however, that the district court's order has not "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision", S. Ct. Rule 19.

CONCLUSION

Petitioners make out no case, prima facie or otherwise, for issuance of a writ of certiorari and the petition should be denied.

DATED: November 27, 1979.

Respectfully submitted,

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